A

BONIFACE LOBO ROBERT V LOBO & ANOR v. TRIBUNAL PENGURUSAN STRATA, PUTRAJAYA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[JUDICIAL REVIEW NO: WA-25-59-03-2016]
4 APRIL 2017

B

CIVIL PROCEDURE: *Judicial review – Certiorari – Application to set aside decision of Strata Management Tribunal ('Tribunal') – Allegation that Tribunal breached rules of natural justice in hearing and determining claim – Whether Tribunal heard or considered merits of substantive claim – Whether claimant denied from making oral submissions – Whether Tribunal breached rules of natural justice when it did not inform claimant on law relied upon – Whether Tribunal lacked impartiality or acted in bad faith – Strata Management Act 2013*

C

LAND LAW: *Strata title – Joint Management Body – Joint Management committee – Application to set aside decision of Strata Management Tribunal ('Tribunal') – Whether Tribunal heard or considered merits of substantive claim – Whether claimant denied from making oral submissions – Whether Tribunal breached rules of natural justice when it did not inform claimant on law relied upon – Whether Tribunal lacked impartiality or acted in bad faith – Strata Management Act 2013*

D

E

The first applicant was the Chairman of the Joint Management Committee ('JMC') of the Joint Management Body of the Silverpark Resort. When the other members of the JMC resigned, leaving the first applicant alone on the committee, a notice was sent to all proprietors to convene an extraordinary general meeting ('the EGM'). New JMC members were subsequently elected at the general meeting and they were the third to ninth respondents in this action. The new JMC members commenced an action against the first applicant seeking declarations that (i) the resolutions and action taken by the JMC during the time that its composition, which were below the statutory minimum, were invalid, unlawful or both; and (ii) the JMC elected pursuant to the EGM was lawfully and validly elected. Before he became aware of this action, the first applicant filed a claim under the Strata Management Act 2013 ('the SMA') to the Strata Management Tribunal ('the Tribunal'), alleging that the EGM was unlawful. The first applicant also made an application for an interlocutory order in Form 14 of the SMA to cancel the notice of the AGM. During the proceedings, the first applicant contended that the President of the Tribunal ('the President') did not give him an opportunity to make his reply submissions following which the first applicant made an application to recuse the President from continuing to hear the claim. By the time the first applicant's hearing came before the Tribunal, the High Court declared in favour of the new JMC members and the President of the Tribunal considered himself bound by the said decision. The

F

G

H

I

Tribunal further found that (i) the application in Form 14 to nullify the notice of the AGM was a matter outside its jurisdiction; and (ii) on the issue of recusal, the President did not have any personal interest in the case as the parties were not his acquaintances and there had not been any act that showed any tendency to favour any party. This prompted the applicants to commence this application for judicial review to set aside the decision of the Tribunal as it was submitted that the Tribunal had breached the rules of natural justice in hearing and determining the applicants' claim. The issues that arose for the court's determination were (i) whether the Tribunal delivered its decision without (a) hearing or considering the merits of the substantive claim; (b) allowing the first applicant to begin his oral submissions; and (c) hearing or considering the merits of the interlocutory application in Form 14; (ii) whether the Tribunal breached the rules of natural justice when it did not inform the first applicant on the law relied upon by it on the recusal application; and (iii) whether the Tribunal lacked impartiality or acted in bad faith.

Held (dismissing application):

(1) The Tribunal had heard and made a determination on the substantive claims. The High Court ruled that the JMC elected pursuant to the EGM was lawfully and validly elected. The Tribunal was entirely correct to have deferred to the High Court on the issue of lawfulness of the EGM based on the decision of the High Court. (paras 35 & 42)

(2) Section 113 of the SMA provides for the statutory obligation of the Tribunal to act fairly and impartially and to give each party a reasonable opportunity to present its case and to respond to his opponent's case. Based on notes of evidence and proceedings and the first applicant's own affidavit, he had not only been given the opportunity to file written submissions in reply to the respondents' arguments but he was also not prevented from presenting his arguments orally. Even if there was evidence to suggest that the notes of proceedings did not record each and every detail of the exchanges that had taken place at the hearing, this did not mean that what had been recorded did not actually take place. (paras 48, 49 & 56)

(3) Part 1 of the Fourth Schedule of the SMA provides for the matters in which a claim may be made to the Tribunal. These matters do not include the ability of the Tribunal to nullify a notice of a general meeting. The Tribunal is a creature of statute and does not have any inherent jurisdiction and hence must derive its powers from the four corners of its constituting Act. Having regard to the provisions of the SMA as a whole, the power to grant an interlocutory order to nullify a notice of AGM is not considered as one that exists by necessary implication. The Tribunal was (i) entitled to have made a determination

on the application in Form 14 after having received the written submissions of the first applicant; and (ii) entirely correct to have dismissed the application on the basis that it did not have the jurisdiction to grant the order prayed for. (paras 65-67)

(4) The first applicant contended that the Tribunal committed an error of law when the President stated that he had wanted to confer with others in connection with the recusal application. There was no evidence that the President had wrongly exercised his judicial discretion by conferring with third parties. There ought to be nothing wrong with a statement from an adjudicator that he or she wished to check up on the law as no one could claim to have a monopoly on knowledge. Furthermore, this ground for challenge had not been set out in the statement filed by the applicants pursuant to O. 53 r. 3(2) of the Rules of Court 2012, which meant that it did not form a valid ground for challenge before the court. (paras 72 & 73)

(5) There was no suggestion that the President had any personal interest in the outcome of the dispute. The contention that the President was guilty of bad faith remained unproven. The first applicant's exchanges suggested some level of frustration on the part of the President in the course of conducting the proceedings which manifested in an inappropriate manner of addressing the first applicant but there was nothing to suggest that the President was motivated by bad faith or an improper motive. (para 95)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ 268 CA ***(refd)***

Comsa Farms Bhd v. Malaysian Assurance Alliance Bhd [2012] 3 CLJ 724 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2011] 7 CLJ 253 CA ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Lee Wah Bank Limited v. National Union of Bank Employees [1980] 1 LNS 115 ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***

Nothman v. Barnett London Borough Council [1978] 1 WLR 220 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***

V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors [2000] 4 CLJ 882 CA ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, s. 11(2)

Strata Management Act 2013, ss. 105(1), 113, 121(1), (3), 145, Fourth Schedule item 6

Strata Management (Maintenance and Management) Regulations 2015, reg. 21(1), (2)

For the applicants - in person

For the respondents - N Subramaniyan; M/s Subramaniyan

Reported by Najib Tamby

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The applicants applied for judicial review to set aside a decision of the Strata Management Tribunal established under the Strata Management Act 2013. The applicants, who were the claimants before the tribunal, contended that the tribunal had breached the rules of natural justice in hearing and determining the applicants' claim.

Background Facts

[2] The first applicant, Mr Bonifac Lobo, was a proprietor of a parcel in a property known as Silverpark Resort, in Fraser's Hill. On or about 28 October 2014, Mr Lobo was elected as chairman of the Joint Management Committee of the Joint Management Body of the Silverpark Resort. This Joint Management Body is the second applicant, and is referred to in this judgment as the JMB.

[3] The JMB was established pursuant to the provisions of the Building and Common Property (Maintenance and Management) Act 2007 (referred to here as the 2007 Act), which was repealed by the Strata Management Act 2013 on 1 June 2015. Under s. 11 of the 2007 Act, the Joint Management Committee exercised the powers of the JMB.

[4] There were four others who were elected to the Joint Management Committee at the same as Mr Lobo at the October annual general meeting of the JMB. By the end of November, three of those four had resigned. Over the course of the next few months, three other proprietors were appointed by the remaining members of the committee, to replace those who had resigned. By 26 May 2017, all the other members of the committee had resigned, leaving Mr Lobo alone on the committee.

[5] The following day, a notice was sent to all proprietors to convene an extraordinary general meeting of the JMB on 13 June 2015, on the basis that the committee no longer existed in law as s. 11(2) of the 2007 Act required that there be a minimum of five proprietors elected to the committee.

[6] New committee members were elected at the 13 June 2015 general meeting. They are the third to ninth respondents in this action. Mr Lobo's position was that this meeting was unlawful and had been unlawfully convened.

[7] At the end of June 2015, a firm of solicitors purporting to act on behalf of the JMB (and, it appears, at the instructions of Mr Lobo) demanded from one Stewart Cheng Tin Kew that he delivers up the assets, books and records of the JMB. Mr Cheng is the tenth respondent in the action before this court and was (or is) the building manager for the Silverpark Resort.

[8] Mr Lobo also wrote to Mr Cheng on 29 June 2015 informing him that his employment contract with the JMB had ceased to have effect from 1 June 2015 "because of the relevant provisions of the SMA".

[9] Shortly after, on 9 July 2015, the new Joint Management Committee (comprising the third to ninth respondents, whose election to the committee Mr Lobo disputes) commenced an action by way of originating summons against Mr Lobo seeking (among others) declarations that:

(a) the resolutions and actions taken by the Joint Management Committee during the time that its composition were below the statutory minimum were invalid, unlawful or both; and

(b) the Joint Management Committee elected pursuant to 13 June 2015 extraordinary general meeting was lawfully and validly elected.

[10] Before he became aware of this originating summons action, Mr Lobo on 14 July 2015 filed a claim under the Strata Management Act 2013 to the Strata Management Tribunal. The precise nature of Mr Lobo's claim and the manner in which it had been drafted gave cause to the learned President of the Tribunal to remark upon it. For the present purposes, it suffices to state that, after carefully examining the applicants' statement of claim and the appendices, I came to the conclusion that Mr Lobo had contended that:

(a) the 13 June 2015 extraordinary general meeting was unlawful (based upon a letter issued on 4 June 2015 from the Commissioner of Buildings, Raub, of which more later)[1];

(b) Mr Cheng the building manager had unlawfully retained possession of the assets, books and records of the JMB by his failure to accede to the demand for them to be handed over;

(c) Mr Cheng's employment with the JMB had ceased by operation of law by his failure to provide a bond to the JMB as required pursuant to the provisions of the Strata Management Act 2013 when it came into force on 1 June 2015.

[11] These are the three substantive complaints of Mr Lobo as can be gleaned from the particulars set out in appendices two and three to the statement of claim[2]. All other claims or relief sought can be related back to these three principal contentions.

Proceedings Before The Tribunal

[12] The proceedings before the learned President of the tribunal commenced on 11 January 2016, which Mr Lobo argued his claim. Proceedings were adjourned to allow the respondents to reply. In the meantime, Mr Lobo had made an application for an interlocutory order in Form 14 of the Strata Management Act 2013 to cancel the notice of the eighth annual general meeting, which was to be held on 23 January 2016.

[13] The case resumed on 14 January 2016, at which the respondents argued their case. Then came the turn for Mr Lobo to reply, and it is at this point that matters took a turn for the worse. Mr Lobo contended that the learned President did not give him an opportunity to make his reply submissions, following which Mr Lobo made an application to recuse the President from continuing to hear the claim.

[14] Mr Lobo affirmed a statutory declaration on 2 February 2016, which recounted (among others) his version of events at the second hearing date on 14 January 2016. This statutory declaration was submitted to the tribunal on 3 February 2016, which was the date fixed for the decision.

The Decision Of The Tribunal

[15] In relation to the matters in dispute, the tribunal recorded the following in its grounds of judgment:

> After a short inquiry during the trials, the claimant may have realised that the claims in Appendix 2 cannot stand or for the reasons only known to him, the claimant then sought and explained that the actual claims are in para 13-16 of the Appendix 3 instead, which is in actual fact just the particulars of his claims. It is important to note that both parties had then abandoned the claims in Appendix 2 and only argued on para 13-16 of Appendix 3.

[16] Paragraphs 13-15 of appendix 3 relate to the issues surrounding Mr Cheng's employment as the building manager, while para. 16 is a statement that the JMB (the erstwhile second applicant in the claim) was not able to carry out its statutory duties (presumably because the assets, books and records continued to retained by Mr Cheng).

[17] In other words, the tribunal had delimited the matters in dispute to these issues only, and considered the other claims as having been abandoned.

[18] By the time of the hearing of Mr Lobo's claim before the tribunal, the High Court had delivered its decision in the originating summons action. The High Court had, among others, declared:

A (a) as invalid and unlawful the resolutions and actions taken by the Joint Management Committee during the time that its composition was below the statutory minimum; and

(b) that the Joint Management Committee elected pursuant to 13 June 2015 extraordinary general meeting was lawfully and validly elected.

B

[19] Having examined the grounds of decision of the tribunal closely, I am of the view that the learned President clearly considered himself as being bound by the decision of the High Court. He stated:

> 8. As the "New JMB" is a valid JMB, the employee only takes instruction
C from the New JMB not from the claimants anymore.

[20] Therefore, because the "new JMB" (or, to put it more correctly, the JMB acting through the new JMC) continued to recognise Mr Cheng as an employee, the tribunal found that Mr Cheng was not answerable to Mr Lobo or the old JMC. As a consequence of the finding of the High Court,
D the tribunal also held that the obligation to discharge the statutory duties of the JMB fell on the new JMC.

[21] As for the application in form 14 to nullify the notice of annual general meeting, the tribunal found that the matter was outside its jurisdiction because it did not fall within any of the 14 matters provided for in the Fourth
E Schedule to the Strata Management Act 2013.

[22] On the application for recusal of the President from continuing to hear the claim, the learned President dismissed the application, and found that although there had been arguments between the tribunal and the claimants,
F the President did not have any personal interest in the case, the parties were not his acquaintances and there had not been any act that showed any tendency to favour any party.

The Applicants' Grounds For Challenge

[23] The application for review was made both under the inherent powers
G of the court and pursuant to s. 121 of the Strata Management Act 2013, which allows a party to proceedings before the Strata Management Tribunal to apply to the High Court to challenge any award on the grounds of "serious irregularity".

[24] The applicants do not seek to challenge the decision of the tribunal on
H its merits, but instead claim that the proceedings before the tribunal had been in breach of the rules of natural justice. The applicants seek for an order for *certiorari* to quash the decision of the tribunal and for an order that the claim be heard before another President of the Strata Management Tribunal. Be that as it may, the merits of the claim are nonetheless still pertinent
I considerations, as we shall see later.

[25] The applicants enumerate seven instances where the tribunal had committed breaches of natural justice[3]. These are set out *verbatim* below:

(a) The 1st or the 2nd Respondent had acted in breach of the fundamental rules of Natural Justice as follows:

(b) In not informing the 1st Applicant about the law relied upon by the 2nd Respondent to refuse to recuse himself to enable the 1st Applicant to reply in submission;

(c) In making the said Award before even allowing the 1st Applicant to begin his oral submissions;

(d) In making the Award without hearing the merits of the Strata Management Tribunal Claim No: TPS/B-0009-7/15 and the Interlocutory application in Borang 14 (Exhibit BL-11 of the 1st Applicant's affidavit in support filed herein);

(e) The 1st and or 2nd Respondent had acted in breach of the rules of procedural propriety in section 113 the SMA;

(f) The 1st Applicant had been denied his proprietary rights with regard to the allocation of shares units to his detriment pursuant to section 8 of the SMA and section 36 of the Strata Titles Act 1985

(g) The 2nd respondent had acted in bad faith contrary to section 145 SMA;

(h) In dismissing the application in Borang 14 (Exhibit BL-11 of the 1st Applicant's affidavit in support filed herein) as academic without hearing even submissions, the 2nd Respondent had acted contrary to natural justice and or procedural propriety and enabled a *fiat accompli* for the 3rd to 10th respondents despite the facts in the Statutory Declaration in Exhibit BL-15 of the 1st Applicant's affidavit in support filed herein.

[26] Having considered these heads of challenge, particularly in the context of the facts of this case, I am of the view that they ought to be recast, in aid of a logical framework to analyse the applicants' contentions. In particular, paras. (d) and (g) do not cite a specific instance where it was alleged that the tribunal made a reviewable error, but rather make a general allegation of bad faith and lack of partiality. I will therefore address these allegations in connection with the other specific instances where it was alleged that the tribunal fell into error. Paragraph (f) also does not specify an instance of a breach of natural justice or other reviewable error, but rather sets out the consequence that purportedly befell Mr Lobo as result of the other alleged breaches.

[27] The issues for consideration by this court are as follows:

(a) whether the tribunal delivered its decision without hearing or considering the merits of the substantive claim;

(b) whether the tribunal delivered its decision without allowing Mr Lobo to begin his oral submissions;

(c) whether the tribunal delivered its decision on the interlocutory application in form 14 without hearing or considering the merits of the application;

(d) whether the tribunal breached the rules of natural justice when it did not inform Mr Lobo on the law relied upon by it in deciding on the recusal application; and

(e) whether the tribunal lacked impartiality or acted in bad faith in relation to any of the instances set out in the preceding paragraphs.

Summary Of This Court's Decision

[28] The following summarises the findings of this court:

(a) with regards to the contention that the tribunal delivered its decision without hearing or considering the merits of the substantive claim, I am of the view that:

(i) the tribunal had in fact heard the submissions of parties on the substantive claim (see paras. 48 and 49, *post*);

(ii) the tribunal was correct to have regarded the issue of the legality of the extraordinary general meeting held on 13 June 2015 as having been determined by the High Court in the originating summons action commenced by the respondents (see para. 35);

(iii) the tribunal had in fact made a determination on the merits in relation to the issues of whether Mr Cheng had unlawfully retained the assets, books and records of the JMB, and whether his employment had terminated by operation of law as a result of the coming into force of the Strata Management Act 2013 (see paras. 40 and 41);

(b) in relation to the contention that the tribunal had delivered its decision without allowing Mr Lobo to begin his oral submissions:

(i) on the facts of the case, 1 find that Mr Lobo had been given the opportunity to respond orally to the respondent's arguments (see para. 56);

(ii) even if Mr Lobo had been prevented from providing an oral response to the respondents' arguments, he had in fact been given the opportunity to provide written submissions. Hence there had not been any breach of natural justice (see para. 57);

(c) on the contention that the tribunal delivered its decision on the interlocutory application in form 14 without hearing or considering the merits of the application:

(i) the tribunal had in fact heard the merits of the interlocutory application because Mr Lobo had dealt with the issue of the interlocutory application in his written submissions of 13 January 2015 (see para. 61);

(ii) the tribunal was entirely correct to have dismissed the interlocutory application on the basis that it did not have the jurisdiction to grant the order prayed for (see para. 63);

(d) on the contention that the tribunal breached the rules of natural justice when it did not inform Mr Lobo on the law relied upon by it in deciding on the recusal application, I am of the view that there was no obligation placed on the tribunal to provide to Mr Lobo the authorities upon which it sought to rely before it made a decision on the recusal application (see para. 70);

(e) on the contention that the President of the tribunal breached the rules of natural justice by making a determination on the recusal application, I am of the view that there is no rule of general application that prohibits a judge or other tribunal from hearing an application for his own recusal (see para. 81);

(f) the contention that the tribunal lacked impartiality or had acted in bad faith was unproven (see paras 94 and 95);

(g) in his oral and written submissions, Mr Lobo raised certain points of challenge that I consider not to have been set out in the applicants' statement pursuant to O. 53 r. 3(2) (see paras. 71 to 74);

(h) even if this court were to hold that there had been a reviewable error committed by the tribunal, the tribunal had in fact come to the right decision on the merits of the case, and hence the justice of the case lies in refusing the order of *certiorari* (see paras. 99 to 102); and

(i) *certiorari* and *mandamus* cannot be granted because the applicants' prayers for relief in the original action before the tribunal are inconsistent with the findings of the High Court in the originating summons action (see paras. 106 and 107).

[29] The detailed analysis of my findings are addressed in the following paragraphs.

Analysis

Whether The Tribunal Heard And Considered The Merits Of The Substantive Claim

[30] I am of the view that the learned President had in fact heard submissions on the merits of the substantive claims. The evidence is evaluated at paras. 43 to 49, *post*.

[31] The substantive claims of the claimants have been analysed at para. 10 *ante*, and I concluded that they revolved around three main issues. To these three it may be added the issue of whether the JMB has been prevented to carry out its statutory duties, but in my view, this is merely a consequence of a prior alleged breach, and is not itself an allegation of breach that forms the basis of a claim.

[32] The first observation that may be made is that the statement of claim produced by the applicants suffer from slight imperspicuity: at the relevant part of the form 1 where the claimants are to have set out their claim, the applicants had inserted a reference to an appendix 2, which instead set out the reliefs that they were seeking. At the relevant part of form 1 where the particulars of claim were to have been set out, the applicants inserted a reference to appendix 3. It is here that the substantive claims of the applicants are set out, together with the particulars of such claim.

[33] The three issues that I had identified as forming the basis of the applicants' claims are:

(a) whether the 13 June 2015 extraordinary general meeting was unlawful (based upon a letter issued on 4 June 2015 from the Commissioner of Buildings, Raub, of which more later)[4];

(b) whether Mr Cheng the building manager had unlawfully retained possession of the assets, books and records of the JMB by his failure to accede to the demand for them to be handed over;

(c) whether Mr Cheng's employment with the JMB had ceased by operation of law by his failure to provide a bond to the JMB as required pursuant to the provisions of the Strata Management Act 2013 when it came into force on 1 June 2015.

[34] The learned President treated the first of these issues as having been abandoned (see paras. 15 to 17, *ante*). He also dealt specifically with the next two issues, when he found that firstly, because the new Joint Management Committee was the validly constituted, Mr Cheng was not answerable to the claimants and secondly there was no requirement under the Strata Management Act 2013 or its regulations for an employee like Mr Cheng to provide any bond. (The merits of this particular finding are considered in greater detail at para. 41, *post*.)

[35] In my view, the tribunal was entirely correct to have deferred to the High Court on the issue of the lawfulness of 13 June 2015 extraordinary general meeting, based on the decision of the High Court on 30 December 2015. The High Court had ruled that the Joint Management Committee elected pursuant to 13 June 2015 extraordinary general meeting was lawfully and validly elected. It would follow as a necessary corollary that 13 June 2015 extraordinary general meeting was not unlawful.

[36] The reasons for which the tribunal considered this issue as having been abandoned by the parties are not recorded in the grounds of judgment, but it would not be unreasonable to conclude that the parties would have regarded the issue as spent. The proper course would be to appeal against this decision of the High Court (as Mr Lobo has) and not to seek for the issue to be re-ventilated before a new President.

[37] Mr Lobo relied on a letter issued by the Commissioner of Buildings, Raub dated 4 June 2015. In this letter, the Commissioner had stated that:

> [N]otis EGM yang dikeluarkan menggunakan Akta 663 tersebut adalah tidak tepat serta bercanggah dengan seksyen 10(2)(a) yang mana jelas menyatakan bahawa hanya "Badan" yang boleh mengendalikan EGM.

[38] Mr Lobo contended that this amounted to a ruling that the notice of extraordinary general meeting issued on 27 May 2015 was void. However, this overlooks the fact that the High Court had ruled on the validity of the appointments made at the general meeting of 13 June 2015, hence any challenge on the validity of the notice to convene the general meeting would be purely academic.

[39] More importantly and significantly, the Commissioner issued a subsequent letter dated 10 June 2015 which effectively resiled from the position stated in the 4 June 2015 letter when it became clear to the Commissioner that all the other members of the then-Joint Management Committee had resigned. For reasons that are not clear to me at this point, Mr Lobo did not consider it fit to bring this court's attention to this subsequent letter.

[40] It would also follow as a necessary consequence of the finding that the 13 June 2015 meeting was lawfully held that Mr Cheng was entitled to have refused to hand over the assets, books and records of the JMB to Mr Lobo.

[41] On the issue of the contention that Mr Cheng's employment as a building manager had come to an end by operation of law by the coming into force of the Strata Management Act 2013, I disagree with the contention of Mr Lobo that reg. 21 of the Strata Management (Maintenance and Management) Regulations 2015 requires an employee to furnish a bond to the JMB. Even though reg. 21(2) read together with reg. 21(1) appears to require a bond to be provided where the JMB employs the services of any person to undertake the maintenance and management of the common properties, this requirement in my view only applies where the maintenance and management services are being provided by a third-party service provider. That this is so can be seen from the requirement in sub-reg. (1) that the JMB enters into a management agreement with the service provider. It would be absurd for the JMB to have to enter into a management agreement with its own employee, and it would follow that in such circumstances, it would be absurd to require a building manager to provide a bond of at least RM50,000 for the mere privilege of being employed. It is well-established that the court may depart from a strict reading of a statute where such a literal interpretation would lead to an absurd result: see the dicta of Denning MR in *Northman v. Barnett London Borough Council*[5], as applied by the Federal Court recently in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Berhad v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor*[6].

[42] In summary, therefore, I find that the tribunal had in fact heard and made a determination on the substantive claims. On the issue of the validity of 13 June 2015 extraordinary general meeting, the tribunal had acted entirely correctly to have accepted the decision of the High Court. I therefore dismiss this particular ground of challenge.

Whether The Tribunal Delivered Its Decision Without Allowing Mr Lobo To Begin Oral Submissions

[43] It is of course trite that where a party is denied its right to be heard, this would amount to a breach of natural justice and any decision arrived at as a consequence would be liable to be set aside by a reviewing court.

[44] In addition, s. 113 of the Strata Management Act 2013 provides for the statutory obligation of the Strata Management Tribunal to act fairly and impartially, and to give each party a reasonable opportunity to present its case and to respond to his opponent's case.

[45] Under s. 121(1) of the Act, a party to any proceedings before the tribunal may apply to the High Court to challenge an award on the grounds of serious irregularity affecting the award. Section 121(3) defines the expression "serious irregularity":

> (3) For the purpose of this section, "serious irregularity" means an irregularity of one or more of the following kinds which the court considers has caused substantial injustice to the applicant:
>
> (a) failure by the tribunal to comply with section 113;
>
> (b) failure of the tribunal to deal with all the relevant issues that were put to it; or
>
> (c) uncertainty or ambiguity as to the effect of the award.

[46] In the O. 53 statement, the applicants contend that the tribunal had made the award "before even allowing the first applicant to begin his oral submissions".

[47] It can be seen, however, from the notes of evidence that Mr Lobo had orally presented his principal submissions on 11 January 2016. At the hearing before this court, Mr Lobo clarified that this ground for challenge was intended to refer to the fact that, according to Mr Lobo, he was prevented from delivering his oral reply submissions on 14 January 2016.

[48] Having examined the material before this court (including the notes of proceedings and Mr Lobo's own affidavits), I was able to ascertain that the following chain of events took place:

(a) the respondents had filed their written submissions with the tribunal on 11 January 2016. Mr Lobo then requested for time to file his interlocutory application in form 14, and the submissions and authority regarding the issue of *res judicata*[7];

(b) the tribunal had allowed Mr Lobo the additional time requested, and directed for further submissions to be filed in by noon on 13 January 2016;

(c) in the written submissions filed by Mr Lobo on 13 January 2017, he repeated some of the points raised in the course of oral submissions on 11 January 2013 and-this is key-raised further points in rebuttal to the submissions of the respondents[8];

(d) the notes of proceedings recorded that Mr Lobo had in fact been given the opportunity to reply orally to the submissions of the respondents. Page 7 of the notes of proceedings recorded the following:

> Mr. Lobo : Reply
>
> All my basis, to make this claim, in para 1 and 2. As JMB and purchaser para 3
>
> Section 107 (b) allows me to make application. July 2015 belum ada keputusan High Court, decision pada 30.12.2015.
>
> Para 1 Forth Schedule ada wide power to tribunal.
>
> Minta sahkan arahan COB melalui surat 4.6.15 para 13, para 14 fall under section (1) Fourth Schedule dan Section 12.

[49] In my judgment, the document shows that not only had Mr Lobo been given the opportunity to file written submissions in reply to the respondents' arguments, but he was also not prevented from presenting his arguments orally.

[50] In his further affidavit at encl. 10, Mr Lobo sought to cast doubt on the completeness of the notes of proceedings in the following terms:

> 14. Saya sesungguhnya percaya bahawa kononnya nota-nota prosiding dalam Eksibit L-2 adalah tidak lengkap dan tidak mencerminkan seluruh prosiding pada tarikh-tarikh yang dinyatakan di dalamnya…

[51] However, Mr Lobo did not challenge the accuracy of the matters that had been recorded in the notes of proceedings. It is one thing to say that the document is incomplete and therefore not an accurate record of the proceedings as a whole, but Mr Lobo did go so far as to say that the notes of proceedings wrongly recorded the matters that had gone on before the tribunal.

[52] It will be recalled that Mr Lobo had affirmed a statutory declaration recounting his version of events at the second hearing date on 14 January 2016. The relevant passages are set out below:

> (c) The chairman then posed questions to Mr Choo and provided the answer and recorded the same. That was before I had commenced by submissions. I was then asked to reply.

A (d) As I began my oral submissions and touched on the irregular way where Mr. Choo was led to answer questions, the Chairman commented why I was "… showing face …".

(e) I replied that I am not showing face but submitted orally as invited to do so.

B (f) The Chairman kept on interrupting me in the next minute or so and then stated "… can you appreciate that you are making everyone's life difficult …"

(g) I thereupon applied for the chairman to recuse himself from hearing the matter further …

C **[53]** Mr Lobo relied on this statutory declaration as evidence of his contention that he was not given an opportunity to reply orally to the respondents' case. He also contends that I am to prefer the version of events set out in his statutory declaration and cites the following passage of the decision of the Court of Appeal in *Pengiran Othman Shah Pengiran Mohd* D *Yusoff v. Karambunai Resorts Sdn Bhd*[9] in support of his argument:

> When a question of law becomes an issue, this in itself will not prevent the Court from granting the application for as long as the Court is satisfied that the issue of law is unarguable and unsustainable it may proceed to determine that question. See *Bank Negara Malaysia v. Mohd.* E *Ismail & Ors* [1992] 1 SCR 445. Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the Court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.[10]

F **[54]** In my view, the notes of proceedings are no less contemporaneous when compared to the statutory declaration prepared by Mr Lobo. Even though the notes of proceedings were made available to the applicants only on 29 June 2016, it would be safe to surmise that they would have been prepared based on notes taken down by the tribunal at the hearing.

G **[55]** Thus the dispute of fact here lies between two contemporaneous documentary evidence: the statutory declaration affirmed by Mr Lobo which he contended showed that he had not been given the opportunity to reply orally to the respondents' submissions, and the notes of proceedings, which H recorded that a reply was indeed given.

[56] In my judgment, in assessing the credibility of a document prepared by a statutory tribunal established under the auspices of a Government Ministry versus that of a statutory declaration affirmed by an interested party in the action, greater credence ought rightly be given to the former. Even if I there is evidence to suggest that the notes of proceedings did not record each and every detail of the exchanges that had taken place at the hearing, this does not mean that what had been recorded did not actually take place. To hold otherwise would be to infer bad faith on the part of the learned President,

which as we shall see later is not an allegation that has been made out. I therefore find that, as a matter of fact, Mr Lobo had indeed been given the opportunity to respond orally to the respondent's arguments.

[57] More crucially, even if Mr Lobo's version of events is to be believed, it does not change the fact that he had been given the opportunity not only to present his case orally on 11 January 2016, but he had also been given the opportunity to respond to the respondents' contentions, through his written submissions of 13 January 2016. For this reason alone, the applicants' contention that there had been a breach of the rules of natural justice must fail.

Whether The Tribunal Determined The Interlocutory Application In Form 14 Without Hearing Or Considering The Merits

[58] The next ground for challenge was the contention that the tribunal had determined the applicants' application in form 14 without hearing submissions from the applicants and without considering the merits of the application.

[59] It will be recalled that the applicants had filed an interlocutory application in form 14 on 13 January 2016 seeking to nullify the notice issued by the JMB calling for an annual general meeting on 23 January 2016.

[60] The notes of proceedings do not record arguments being heard on the application in form 14.

[61] However, in his written submissions of 13 January 2016, Mr Lobo had dealt with the issue of the interlocutory application[11]. Therefore, the applicants had in fact been given the opportunity to put forward their case in relation to the application to nullify the notice. The mere fact that the tribunal may not have heard oral arguments does not disentitle it from making a determination on the application.

[62] The next contention is that the tribunal did not consider the merits of the application in dismissing it.

[63] As mentioned in para. 21 *ante*, the tribunal found that the application to nullify the notice of general meeting was outside its jurisdiction because it did not fall within any of the 14 matters provided for in the 14 Schedule to the Strata Management Act 2013. In my view, because the application was dismissed on a preliminary point of law, it was entirely permissible for the tribunal to make the determination without hearing the full merits of the application.

[64] Section 105(1) of the Strata Management Act 2013 provides for the jurisdiction of the Strata Management Tribunal:

> Section 105. Jurisdiction of Tribunal
>
> (1) The tribunal shall have the jurisdiction to hear and determine any claims specified in Part 1 of the Fourth Schedule and where the total

A amount in respect of which an award of the tribunal is sought does not exceed two hundred and fifty thousand ringgit or such other amount as may be prescribed to substitute the total amount.

[65] Part 1 of the Fourth Schedule to the Strata Management Act 2013 provides for the matters in which a claim may be made to the tribunal. These B matters do not include the ability of the tribunal to nullify a notice of general meeting. For example, item 6 allows a claimant to apply for an order to nullify a resolution where due notice has not been given, but does not permit the cancellation of the notice itself.

[66] Like the Industrial Court, the Strata Management Tribunal is a C creature of statute and does not have any inherent jurisdiction, and hence must derive its powers from the four corners of its constituting Act, whether expressly or by necessary implication (see *Lee Wah Bank Limited v. National Union of Bank Employees*[12]). I do not consider that the power to grant an interlocutory order to nullify a notice of general meeting to be one that exists D by necessary implication having regard to the provisions of the Strata Management Act 2013 as a whole.

[67] For these reasons, I am of the view that:

(a) the tribunal was entitled to have made a determination on the E application in form 14 after having received the written submissions of Mr Lobo; and

(b) the tribunal was entirely correct to have dismissed the application on the basis that it did not have the jurisdiction to grant the order prayed for.

F *Whether The Tribunal Committed A Reviewable Error In Not Informing Mr Lobo On The Law Relied Upon By It In Deciding On The Recusal Application*

[68] It is important to appreciate the precise grounds upon which this particular challenge has been mounted. The applicants contended that the tribunal breached the rules of natural justice:

G In not informing the 1st Applicant about the law relied upon by the 2nd Respondent to refuse to recuse himself to enable the 1st Applicant to reply in submission;

[69] The complaint therefore is not that the learned President committed an error of law in failing to recuse himself[13], but rather that the President had H not provided the legal authorities upon which he based the decision not to recuse himself, in order to enable Mr Lobo to submit in reply.

[70] A number of observations may be made:

(a) at the hearing on 14 January 2016, the learned President had not yet I made any decision on the recusal application. This decision was delivered on 3 February 2016, together with the award in connection with the substantive application;

(b) more significantly, the applicants appear to have treated the tribunal as though it were their opponent in the action by asserting that it has a right of reply to the tribunal. The tribunal does not have to provide the legal authorities in order to enable Mr Lobo to reply in submission, because:

(i) a tribunal does not have to provide to litigants the authorities upon which it seeks to rely before it makes a decision on any matter; and

(ii) a litigant does not reply to a decision by an adjudicating body. The remedy lies in an appeal, or a review where it is contended that there had been an error of law.

In this regard, Mr Lobo cited the case of *Yew Wan Leong v. Lai Kok Chye*[14], and reproduced the following quote from that case:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

This passage was in fact an excerpt from the judgment of Mohamed Azmi SCJ from the case of *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors*[15], which was quoted by Gunn Chit Tuan SCJ in *Yew Wan Leong v. Lai Kok Chye*.

Both these cases in fact dealt with the issue of pleadings. In *Yew Wan Leong v. Lai Kok Chye*, the trial judge had decided on an issue that was not reflected in the pleadings or in the submissions of the parties, and the plaintiff's appeal in that case was accordingly allowed.

By contrast, the present case is not one that concerns a decision made by the tribunal based on an unpleaded point. In my judgment, there is no obligation placed on an adjudicator to inform the parties in advance of the basis upon which it proposes to make a decision. To do so will not only effectively give a party the right to reply to a judgment or award (when the proper remedy would be an appeal or review), but would effectively cause the tribunal to descend into the arena of the dispute, which for obvious reasons would be an untenable proposition.

[71] In the course of oral submissions before this court, Mr Lobo also contended that the tribunal had committed an error of law when the President stated that he had wanted to confer with others in connection with the recusal application. Mr Lobo's statutory declaration captures the exchange in the following manner:

(i) After that, I had replied that Mr Choo himself had "threatened" Judicial Review proceedings against the tribunal on the first day of hearing o 11/1/2016. There was no rebuttal from anybody to that statement by me.

A (m) The Chairman then adjourned proceedings to "… discuss with others …" my Recuse application. When I asked if that is regular, he said he wanted to "check up on the law …"[16]

[72] First of all, even if Mr Lobo's version of events is to be accepted, the President had corrected himself by stating that he had wanted to check up B on the law. I am therefore of the view that there is no evidence to suggest that the learned President had wrongly exercised his judicial discretion by conferring with third parties. I should also add that there ought to be nothing wrong with a statement from an adjudicator that he or she wishes to check up on the law, as no one can claim to have a monopoly on knowledge. C Indeed, such candour would be preferable to an arbiter having decided an issue without due regard to judicial precedent.

[73] Secondly, this ground for challenge had not been set out in the statement filed by the applicants pursuant to O. 53 r. 3(2), which means that it does not form a valid ground for challenge before this court. The case of D *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors*[17] established the principle that an applicant's O. 53 statement will bind the applicant, in much the same way that pleadings bind parties to a writ action.

[74] In my judgment, this same principle precludes the applicants from raising these other grounds of challenge set out in Mr Lobo's written E submissions:

(a) at para. 10.3 of his written submissions[18], Mr Lobo argued that the learned President had failed to take into account the matters affirmed by Mr Lobo in his statutory declaration, as the grounds of judgment of the tribunal did not mention this declaration. This too I find to be a ground F of challenge that had not been set out in the applicants' O. 53 statement. Although the statutory declaration was mentioned at para. 3(h) of the O. 53 statement, this was only in connection with the interlocutory application in form 14, which the tribunal found to be outside the remit of its jurisdiction;

G

(b) at para. 10.5 of his submissions[19], Mr Lobo contended that the tribunal was not entitled to go into the merits of the substantive claims, because (according to Mr Lobo) the events that had led to the recusal application occurred prior to Mr Lobo's oral reply to the respondents' submissions. I take this to mean that the tribunal ought to have heard and disposed H of the recusal application before proceeding to hear the claim on its merits. I am unable to entertain this challenge because:

(i) it had not been pleaded in the O. 53 statement;

(ii) in any event, I have made the finding that Mr Lobo had in fact been I given an opportunity to reply to the respondents' submissions, both orally (according to the notes of evidence) and in writing (pursuant to his written submissions of 13 January 2016). There was therefore nothing to prevent the learned President from proceeding to determine the case on its merits; and

(iii) there was also nothing that prevented the learned President to take time to consider the recusal application, the substantive claims as well as the interlocutory application in form 14, and to give a decision on all three applications subsequently, as he had done on 3 February 2016.

Whether The Tribunal Lacked Impartiality Or Acted In Bad Faith In Relation To Any Of The Instances Set Out In The Preceding Paragraphs

[75] Paragraphs 3(e) and 3(g) of the O. 53 statement stated as follows:

(e) The 1st and or 2nd Respondent had acted in breach of the rules of procedural propriety in section 113 the SMA;

(g) The 2nd respondent had acted in bad faith contrary to section 145 SMA;

[76] The first observation is that s. 145 of the Strata Management Act 2013 simply provides immunity to the tribunal where it acts in good faith. It does not seek to place any obligation on the tribunal.

[77] Section 113 of the Strata Management Act 2013 provides as follows:

Section 113. Equal treatment of parties

The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of presenting his case and dealing with that of his opponent.

[78] There are two ways in which the contentions of lack of impartiality and fairness and of bad faith are relevant. These are in connection with:

(a) the learned President hearing the recusal application when an allegation of bias has been made against him, which Mr Lobo contended offended the principle that a man should not be a judge in his own cause; and

(b) the events leading up to the recusal application at the hearing on 14 January 2016.

I consider these in turn.

[79] On the first point, Mr Lobo relied on the Court of Appeal case of *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd*[20], which he argued supports his contention that the learned President ought not to have decided on the recusal application. The fact that the tribunal had done so, argued Mr Lobo, amounted to a breach of natural justice.

[80] The specific passage of the judgment of Azmel Maamor J relied upon by Mr Lobo is set out below:

[T]he more important question to be asked is whether it is proper for such decision to be made by the presiding judge against whom bias has been alleged? In other words, when a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, would such decision not infringe the rule of natural justice in that one should not be

A a judge in one's own cause. This, we think, is the crux of the instant case, even more so when the learned JC would have to decide the degree of bias that would be sufficient to affect his impartiality.

[81] With respect, counsel's reliance on *Rowstead Systems* is misplaced, for this case dealt with the issue of whether a stay of proceedings ought to be
B granted pending the disposal of an appeal against the trial judge's refusal to recuse himself. The Court of Appeal held that special circumstances exist to justify the grant of a stay where there is an appeal pending against a judge's decision not to allow a recusal for alleged bias. *Rowstead Systems* does not establish a general principle that a judge cannot himself hear an application
C to recuse him (in cases involving non-automatic disqualification). Judges hear recusal applications against themselves all the time, and in many cases, their decisions are affirmed by the appellate courts. No authority need be cited for such a fundamental point, although if one is needed see, for example, *Dato Seri Anwar Ibrahim v. PP*[21].

D **[82]** I now turn to the allegations of bias and bad faith in connection to the events leading up to the recusal application. Having examined the notes of proceedings, Mr Lobo's statutory declaration, the grounds of judgment of the tribunal and all other relevant material, I am of the view that the claims of bias and bad faith have not been made out.

E **[83]** The question to be asked in recusal applications is whether there was a real danger of bias on the part of the trial judge or other arbiter (see *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara*[22]. This is to be ascertained from the perspective of an impartial, reasonable and fair-minded bystander who knew of the circumstances of the case: see *Alor Janggus Soon*
F *Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors*[23].

[84] In the following paragraphs, I consider the relevant evidence relating to the allegation of bias and bad faith.

[85] The official notes of proceedings of the tribunal recorded the following
G exchanges:

Mr. Lobo	: Reply
	All my basis, to make this claim, in para 1 and 2. As JMB and purchaser para 3
	Section 107(b) allows me to make application. July 2015 belum ada keputusan High Court, decision pada 30.12.2015.
H	
	Para 1 Fourth Schedule ada wide power to tribunal.
	Minta sahkan arahan COB melalui surat 4.6.15 para 13, para 14 fall under section (1) Fourth Schedule dan Section 12.
I Tribunal	: I was responding to your words, hinting that the tribunal making your life difficult.

Mr. Lobo : Objecting that the tribunal saying that you are making everyone life objection difficult. I was responding, to your word, "don't you think that you are making life difficult for everybody else."

Mr Choo : I believe the tribunal, must have latitude to express itself in the course of the proceeding. In the circumstances of the case allow me to use for want of words, it is tantamount to a threat to tribunal. The tribunal will not be able to perform its duty (for want of a word) it only expressing words, in the course of proceeding.

I don't think the tribunal can perform his duty in the face of threat in recusing decision claimant from the case.

Mr. Lobo : In High Court the application is made to recuse the judge on lesser grounds, it is legitimate. He may want to go for JR. There is no threat.

I want to proceed my application to recuse the president.

Tribunal : I will postpone the proceeding to consider the claimant's application that the president recuse himself or proceed.

[86] It will be seen that the first mention of recusal in the notes of proceedings appears in the speech of Mr Choo, the third respondent. I consider it likely that, at least in this particular exchange, Mr Lobo would have mentioned the recusal application first. It is for this reason that I say that the notes of proceedings do not comprehensively record the exchanges at the hearing (although as mentioned earlier, this does not detract from the credibility of what is contained in the notes of proceedings).

[87] Mr Lobo's statutory declaration recorded the proceedings in the following manner:

(b) With regard to my written submission dated 13/1/2016, the learned Chairman had stated on 14/1/2016 that the matter in paragraph 2.3 of the said submission was misquoted by me. No actual words of the Chairman was given.

(c) The Chairman then posed questions to Mr Choo and provided the answer and recorded the same. That was before I had commenced my submissions. I was then asked to reply.

(d) As I began my oral submissions and touched on the irregular way where Mr. Choo was led to answer questions, the Chairman commented why I was "… showing face …".

(e) I replied that I am not showing face but submitting orally as invited to do so.

(f) The Chairman kept on interrupting me in the next minute or so and then stated "… can you appreciate that you are making everyone's life difficult …"

(g) I thereupon applied for the Chairman to recuse himself from hearing the matter further ("the Recuse application"). At that time a female law student from the Legal Firm of Mr CC Choo was present in the public gallery of the tribunal.

(h) I am entitled to make the Recuse application in view of Section 113 of the Strata Management Act 2013 (SMA) and the principle that justice must not only be done but be seen to be done.

(i) I asked the Chairman to record my oral application.

(j) The Chairman then told Mr. Choo to reply.

(k) Mr. Choo in short, said that for want of a better word, my application was a "… threat …"

(l) After that, I had replied that Mr. Choo himself had "threatened" Judicial Review proceedings against the tribunal on the first day of hearing on 11/1/2016. There was no rebuttal from anybody to that statement by me.

(m) The Chairman then adjourned proceedings to "… discuss with others …" my Recuse application. When I asked if that is regular, he said he wanted to "… check up on the law …".

(n) I then gave notice to all in particular the Respondents that my interlocutory application dated 13/1/2016 and filed in the tribunal was pending. I gave the notice since the subject of my interlocutory application was because the Respondents were planning the 8th Annual General Meeting (AGM) on 23/1/2016. If the said AGM was held, it will make my said interlocutory application academic.

(o) The Chairman and the Respondents had no comments. The chairman then adjourned proceedings to a date to be fixed to decide on the Recuse application.

[88] It will be noted that para. (b) of the statutory declaration recorded a statement by the learned President that "the matter in para. 2.3 of the said submission" had been misquoted by Mr Lobo.

[89] Further, light is thrown on the issue on the grounds of the award:

11. In due course of the trial, there were arguments between the claimant and this tribunal and also with the respondents and as a result, the claimant then applied for the presiding President to recuse himself and the case be heard before another President. The arguments mostly caused by the claimants who to certain extend inappropriately intervened in the course of the trial. Thus, the recusal application was not allowed as the tribunal is fully aware of the fact that it does not have any interest in the case whatsoever and parties are no acquaintance to the President. There is no action that shows tendency to favour any party in this case. This case was decided based solely on facts and law. The arguments between the claimants that the tribunal, were purely in due course of trial and mere change of words in differing opinions and misunderstanding.

12. The claimant, goes to the extent of making a misquoted statement in his submission, by quoting something which the tribunal did not say. This was one of the issues, if at all becomes one of the central issues that leads to argument between the parties and tribunal. The facts to the issue is that one of the notices of a resolution to be discussed and voted in the AGM 13.6.2015 is short serviced to the parcel owner, and when the tribunal says this, "it can be rectified in the meeting itself", what the tribunal meant is that the attending members (qualified parcel owners to the attend the AGM) during the meeting itself can opt to propose and further call for that particular resolution (which is short serviced) NOT to be discussed and passed in the AGM. But it (short serviced itself) is not a valid reason to stop the AGM.

13. However, the whole episode of arguments, is not in any way prejudicial to any party. Being dissatisfied with the presiding President words or arguments is not a valid reason for recusal.

[90] What exactly was contained in the submissions that the learned President took issue with? At para. 2.3 of his written submissions to the tribunal, Mr Lobo had stated:

> 2.3 On paragraph 14 and 15 of Appendix 3 to Borang 1, the tribunal had made an order orally that the law says that the duty of the JMB is to rectify shortcomings under the SMA. It was read out by the learned President. The Claimant had asked for formalizing the decision in an order to which the tribunal agreed.

[91] From the above, it can be established that the following sequence of events occurred:

(a) in his submissions, Mr Lobo put forward the position that the learned President had already made a determination on a particular issue, going even so far as to suggest that such order had been read out by the President;

(b) the learned President, perhaps understandably, took umbrage at this suggestion. From his grounds of award, it appears that he was attempting to explain that, even if there was short notice for one of the matters to be resolved at the general meeting, that did not constitute good grounds to stop the meeting from proceeding, as it was always open to the proprietors to elect not to resolve on the affected matter;

(c) the President then-a little ill-advisedly in my view-chastised Mr Lobo either by remarking or asking a rhetorical question to the effect that he (Mr Lobo) was making life difficult for everybody else; and

(d) Mr Lobo's statutory declaration recorded that the learned chairman had kept on interrupting Mr Lobo for a minute or so, immediately before he made the remark in the preceding paragraph.

[92] Now, it would have been perfectly acceptable for the tribunal to rebuke Mr Lobo for making an unwarranted suggestion in his submissions. In *Comsa Farms Bhd v. Malaysian Assurance Alliance Bhd*[24], Hamid Sultan Abu Backer J held:

> Judicial propriety in essence is the unwritten code of ethical conduct practiced by judges to maintain the highest traditions of judicial rectitude, independence and impartiality. It is well-recognised that judgments should be objective, rational and temperate in language. They must be free from exaggeration and undignified expressions. That does not mean the judge is restrained from criticising in his judgment matters relevant to the conduct and merits of the case, and of persons who are witnesses, provided it is relevant to the case.

[93] Nonetheless, the learned President ought not to have made a suggestion that could be construed as an *ad hominem* attack. It is a human and understandable reaction, but as an adjudicator, the President ought to hold himself above the dispute. An adjudicator should also refrain from constantly interrupting the party making submissions.

[94] However, in my judgment, an impartial, reasonable and fair-minded bystander who knew of the circumstances of the case would not have apprehended any real danger that the decision arrived at would not be free from bias. An objective evaluation of the evidence would show that, though there may have been a small degree of intemperance on the part of the learned President, it is not so serious as to have given rise to a fear that the decision made would be tainted with lack of impartiality. There was also no suggestion that the learned President had any personal interest in the outcome of the dispute.

[95] Having reviewed the material that properly before the court, I am also of the view that the contention that the learned President was guilty of bad faith remained unproven. The exchanges between Mr Lobo as set out in the preceding paragraphs suggest some level of frustration on the part of the learned President in the course of conducting the proceedings, which manifested in an inappropriate manner of addressing the first applicant, but there is nothing to suggest that the learned President was motivated by bad faith or an improper motive.

[96] For these reasons, the applicants' challenges on grounds of bias and bad faith are dismissed.

The Relevance Of The Decision On The Merits

[97] Mr Lobo in his submission took pains to point out that he was merely challenging the procedural propriety of the proceedings before the tribunal. He was not appealing the merits of the case; the remedy that he seeks is for the decision of the tribunal on 3 February 2016 to be quashed and for the claim to be remitted back to be reheard before another President of the Strata Management Tribunal.

[98] As alluded to in para. 24 *ante*, the merits of the case and the ultimate decision under challenge are nonetheless relevant considerations. They are relevant for two reasons, which are explained in the following paragraphs.

Judicial Review Is Discretionary And Its Remedies Are Not Available Ex Debito Justitiae

[99] The first is that *certiorari* is a discretionary remedy, and hence just because a decision-maker may have committed a reviewable error does not mean that *certiorari* ought to be granted *ex debito justitiae*. *Certiorari* and *mandamus* may only be granted if it would be just and equitable in the circumstances to do so. Thus if a tribunal committed an error of law by misstating or misapplying the law but nonetheless arrived at the correct decision, *certiorari* will not lie against the decision so arrived at. The ultimate decision was correct, and the fact that it was arrived at for the wrong reasons ought not to result in a quashing of such decision. The authority for this proposition is the Federal Court case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor*[25] where it was held by Sri Ram JCA as follows:

> In any event, assuming for a moment that the Industrial Court had given wrong reasons for holding that the appellant is a workman within the Act - and we hasten to repeat this is not the case here - its ultimate decision being correct, prerogative relief whether in the form of *certiorari* or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-taker.

[100] It follows as a necessary corollary that where there may have been procedural impropriety in the decision-making process, but the reviewing court is assured that the decision arrived at was the correct ultimate decision, then the proper exercise of judicial discretion would be to refuse the order of *certiorari*. I would hasten to add that more caution ought to be exercised by the court in refusing *certiorari* in cases of procedural impropriety when compared to cases where a tribunal may have misapplied the law. The reason is that breach of natural justice may mean that the complainant may have been prevented from putting forward his case, and so the outcome of the decision on the merits may have been different had the wrongfully excluded arguments been properly considered. Nonetheless, there are cases where the merits of the substantive claim are so clear that, even if there had been no breach of natural justice, it would be apparent that the tribunal would have arrived at the same decision on the merits. In such cases, justice would be properly served by dismissing the application for review.

[101] In my judgment, this is one such case. The success or otherwise of the applicants' case turns entirely on whether the extraordinary general meeting had been properly and lawfully convened and as a consequence, whether the Joint Management Committee members had been validly appointed at 13 June 2015 general meeting. This issue has been the subject of the decision

of the High Court in the originating summons action. It follows on from this that Mr Cheng the building manager was right to have refused to hand the assets, books and records of the JMB over to Mr Lobo. As for the issue of whether Mr Cheng's employment had been terminated by operation of law upon the coming into force of the Strata Management Act 2013, this was a matter to be determined purely as a matter of the proper construction of the Strata Management Act 2013 and its applicable regulations. As mentioned at para. 41 *ante*, this court is in complete agreement with the findings of the tribunal that there is nothing in the applicable laws or regulations that requires Mr Cheng to post a bond to the JMB.

[102] Thus, on the facts of this particular case, even if I had held that there had been a breach of natural justice in the conduct of the proceedings before the tribunal, the substantive merits of the case would have been sufficiently clear for me to determine that the justice of the case lay in refusing the order of *certiorari*.

[103] Mr Lobo sought to persuade in his further written submissions that the principle in *Hoh Kiang Ngan* ought not to apply in the present case because injustice had been occasioned to the applicants by the purported failure of the learned President to hear the application on the merits. This however overlooks the *ratio* of *Hoh Kiang Ngan*: the reason *certiorari* will not lie in circumstances where the decision-maker came to the correct ultimate decision (*albeit* for the wrong reasons) is precisely because there is no injustice to applicant.

[104] In the present case before me, I have found that the ultimate decision by the learned president on the substantive merits of the case was the correct one, and hence no injustice befell the applicants. In any event, I have also found that, on the facts, the tribunal had heard and considered the merits of the application. There was thus no procedural impropriety.

Substantive Relief No Longer Possible

[105] The second way in which the substantive merits of this case is relevant relates to the remedies and reliefs prayed for by applicants in their original claim before the tribunal.

[106] It will be recalled that, among the principal reliefs prayed for was a declaration that the general meeting of 13 June 2015 had been unlawfully convened. However, the High Court in the originating summons action had ruled that the members of the Joint Management Committee elected at this meeting had been legally and validly elected. It necessarily follows from this determination by the High Court that the 13 June 2015 extraordinary general meeting had NOT been unlawfully convened, and that the Strata Management Tribunal would not be capable of granting the reliefs prayed for by the applicants. It would also follow from the finding of the High Court that the Mr Lobo is no longer a member of the Joint Management Committee and therefore cannot exercise any of the powers of the JMB. This in turn will

mean that the tribunal would not be capable of granting even the other reliefs prayed for by the applicants; for example the order to compel Mr Cheng to hand over the assets, books and records of the JMB to Mr Lobo, since Mr Lobo no longer exercises authority on behalf of the JMB.

[107] Accordingly, even if I had come to the finding that there may have been an infirmity in the proceedings conducted before the tribunal, I am unable to grant the order of *certiorari* and to order that the claim be remitted back to the Strata Management Tribunal to be heard before another President because the orders prayed for are inconsistent with the findings of the High Court in the originating summons action.

Conclusion

[108] The reader may view this judgment as being longer than desirable. Regrettably, this was unavoidable due to nature of the applicants' challenge and the ground needed to be covered in the form of the evidence before this court. I have however attempted to deal with the issues with the minimum of prolixity.

[109] The burden on the courts to understand, analyse and decide on cases would be greatly alleviated, however, if applicants for judicial review took time to craft their O. 53 r. 3(2) statement with greater care and organisation. The following are brief suggestions that may serve as a guide to the preparation of such statements:

(a) in setting out the grounds for challenge, applicants should seek to answer the question, "How has the decision-maker committed a reviewable error?" Thus, it is of no assistance to simply state that the decision-maker breached the rules of natural justice, or had made an irrational decision. The specific act complained of should be particularised. Failure to do so will result in the court having to scour the O. 53 statement and the accompanying affidavits to relate the challenge to a specific act carried out by the decision-maker;

(b) once this is done, the next question to be addressed would be, "Why do you say that this conduct should be subject to an order for judicial review?".

[110] Each ground set out in the O. 53 statement should answer both these questions. To give examples:

- The [adjudicator] failed to take into account the relevant evidence referred to at paragraphs [•] and accordingly the decision ought to be set aside on the grounds of *Wednesbury* unreasonableness.
- The failure by the [adjudicator] to recuse himself when there was a real danger of bias resulted in a breach of natural justice.
- By granting [insert reference to the specific terms of an award], the [adjudicator] stepped outside the bounds of its jurisdiction and committed an error of law.

[111] In addition, care should be taken to ensure that there is a minimum of overlap between the various grounds for challenge and that there is no repetition of such grounds.

[112] The preceding paragraphs are of course by way of guidance only, and are not to be taken as mandatory requirements of law.

[113] For the reasons explained in this judgment, the application for judicial review is dismissed with costs. I will now hear submissions on costs.

Endnotes:

1. see paras. 3 and 5 at p. 62 of encl. 3
2. see pp. 60 to 64 of encl. 3
3. see para. 3 of the O. 53 statement set out in encl. 2, and para. 75 of encl. 3
4. see paras. 3 and 5 at p. 62 of encl. 3
5. [1978] 1 WLR 220
6. [2017] 4 CLJ 265
7. see notes of proceedings, p. 4 of exh. L-2 in encl. 10
8. see p. 121 of encl. 3
9. [1996] 1 CLJ 257, [1996] 1 AMR 162, [1996] 1 MLJ 309, [1995] 2 MLRA 166
10. *per* Siti Norma Yaakob JCA
11. see p. 119 of encl. 3
12. [1980] 1 LNS 115; [1981] 1 MLJ 169, [1980] 1 MLRH 133
13. see para. 79 *et seq*., *post* for a further discussion on this point
14. [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330, [1990] 2 MLJ 152, [1990] 1 MLRA 327
15. [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; [1989] 2 MLJ 416, [1989] 1 MLRA 74
16. See p. 191 of encl. 3
17. [2000] 4 CLJ 882, [2000] 2 AMR 2345, [2000] 3 MLJ 652, [2000] 1 MLRA 726
18. see p. 15, *ibid*.
19. see p. 16, *ibid.*
20. [2005] 2 CLJ 465, [2005] 2 AMR 823, [2005] 3 MLJ 132, [2005] 1 MLRA 226
21. [2011] 7 CLJ 253; [2011] 5 AMR 11, [2011] 5 MLJ 535, [2011] 1 MLRA 426
22. [2001] 4 CLJ 701; [2001] 4 AMR 4605, [2002] 1 MLJ 321, [2001] 1 MLRA 630

23. [2002] 4 CLJ 268, [2002] 4 AMR 4361, [2002] 4 MLJ 327, [2002] 2 MLRA 16
24. [2012] 3 CLJ 724; [2012] 4 AMR 115, [2012] 10 MLJ 526, [2012] 3 MLRH 26
25. [1996] 4 CLJ 687; [1996] 3 AMR 3693, [1995] 3 MLJ 369, [1995] 2 MLRA 435